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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 AURELIO S. FARIAS,) Civil No. 10cv260 L(CAB)
11 Plaintiff,)
12 v.) **ORDER GRANTING MOTIONS TO**
13 FCM CORPORATION, *et al.*,) **DISMISS AND TO EXPUNGE LIS**
14 Defendants.) **PENDENS [doc. nos. 16, 17];**
15) **DENYING MOTION TO**
) **WITHDRAW AS ATTORNEY [doc.**
) **#27]**

16 Litton Loan Servicing moves to dismiss plaintiff's complaint and to expunge lis pendens,
17 and Kent Wilson moves to withdraw as counsel of record for plaintiff Aurelio S. Farias. The
18 motions have been fully briefed. The Court considers these motions on the papers submitted and
19 without oral argument pursuant to Civil Local Rule 7.1(d)(1).

20 **A. Motion to Dismiss**

21 **1. Legal Standard**

22 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro v.*
23 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). Federal Rule of Civil Procedure 8(a) requires a
24 complaint to contain "a short and plain statement of the claim showing that the pleader is entitled
25 to relief" FED. R. CIV. P. 8(a). "While a complaint attacked by a Rule 12(b)(6) motion to
26 dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds
27 of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation
28 of the elements of a cause of action will not do. Factual allegations must be enough to raise a

1 right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
 2 (2007) (internal quotation marks, brackets and citations omitted).

3 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of
 4 all factual allegations and must construe them in the light most favorable to the nonmoving
 5 party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Legal conclusions
 6 need not be taken as true merely because they are cast in the form of factual allegations. *Roberts*
 7 *v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *W. Mining Council v. Watt*, 643 F.2d 618,
 8 624 (9th Cir. 1981). Similarly, "conclusory allegations of law and unwarranted inferences are
 9 not sufficient to defeat a motion to dismiss." *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696,
 10 699 (9th Cir. 1998). A *pro se* plaintiff's pleadings are read liberally. *Hebbe v. Pliler*, 2010 WL
 11 2947323 *3 (9th Cir. July 29, 2010)

12 In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond
 13 the complaint for additional facts, *e.g.*, facts presented in plaintiff's memorandum in opposition
 14 to a defendant's motion to dismiss or other submissions. *United States v. Ritchie*, 342 F.3d 903,
 15 908 (9th Cir. 2003); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998); *see also* 2
 16 MOORE'S FEDERAL PRACTICE, § 12.34[2] (Matthew Bender 3d ed.) ("The court may not . . . take
 17 into account additional facts asserted in a memorandum opposing the motion to dismiss, because
 18 such memoranda do not constitute pleadings under Rule 7(a).").

19 **2. Background**

20 Plaintiff brought this action on February 2, 2010, against defendants FCM Corporation,
 21 Quality Loan Service Corp., and Litton Loan Servicing¹ alleging a variety of causes of action
 22 related to a home mortgage loan. FCM was the lender on the loan transaction; Litton was the
 23 servicing company on the loan; and Quality was the trustee under the Deed of Trust.

24 The complaint sets forth that plaintiff executed a promissory note to defendant FCM on
 25 September 1, 2006, that was secured by a deed of trust. In time plaintiff failed to make

26
 27 ¹ On August 9, 2010, defendant FCM Corporation was dismissed without prejudice
 28 for plaintiff's failure to serve within the 120-day period found in Federal Rule of Civil Procedure
 4(m). Defendant Quality Loan Service Corporation filed a declaration of nonmonetary status
 under California Civil Code § 29241 as the trustee under the Deed of Trust.

1 payments under the terms of the note and as a result of his defaults, foreclosure was initiated on
2 the property. A Notice of Trustee's Sale was recorded on September 25, 2009 and on December
3 7, 2009, the foreclosure sale of the property occurred. On February 2, 2010, plaintiff recorded a
4 Notice of Pendency of Action.

5 Litton's pending motion to dismiss is directed to the two causes of action brought against
6 it: plaintiff's fourth cause of action for quiet title and fifth cause of action for accounting and
7 violation of 12 U.S.C. § 2605(e) and 24 C.F.R. § 3500.

8 **3. Quiet Title**

9 A plaintiff may bring an action to quiet title "to establish title against adverse claims to
10 real or personal property or any interest therein." CAL. CODE CIV. P. § 760.020(a). The Code
11 defines a "'Claim' [as] includ[ing] a legal or equitable right, title, estate, lien, or interest in
12 property or cloud upon title." CAL. CODE CIV. P. § 760.010(a). To state a claim to quiet title, a
13 complaint must be verified and include (1) a legal description of the property and its street
14 address or common designation; (2) the title of the plaintiff and the basis of the title; (3) the
15 adverse claims to the title of the plaintiff; (4) the date as of which the determination is sought;
16 and (5) a prayer for the determination of the title of the plaintiff against the adverse claims. CAL.
17 CIV. PRO. § 761.020.

18 Plaintiff states that he has alleged fraud in his complaint and as a result, has properly
19 pleaded the basis of his quiet title cause of action. Although unclear, it appears plaintiff is
20 suggesting that the fraud allegations, which the Court notes have not been pleaded with
21 particularity, would support rescission and therefore, would sustain a claim to quiet title.

22 The complaint contains no allegations with respect to the interest claimed by Litton in the
23 property likely because Litton was the loan servicer and had no ownership interest in the
24 property. Also, the complaint does not set forth facts sufficient to show that Litton has asserted
25 an adverse claim to plaintiff's title. Furthermore, the complaint is not verified. The Court
26 concludes that the complaint fails to state a claim against Litton for quiet title.

27 Because Litton did not have an ownership interest in the Property, plaintiff cannot cure
28 the pleading deficiencies of the complaint and this claim against Litton is dismissed with

1 prejudice.

2 **4. Accounting based on violation of RESPA**

3 Plaintiff's fifth cause of action alleges that Litton violated RESPA by failing to respond to
4 his Qualified Written Request ("QWR") and therefore, plaintiff seeks an accounting based on
5 this alleged violation.

6 RESPA requires "any servicer of a federally related mortgage loan" to respond in writing
7 within a specified period to a QWR "from the borrower (or an agent of the borrower) for
8 information relating to the servicing of such loan. . . ." 12 U.S.C. § 2605(e) (1)(A). RESPA
9 defines a QWR as follows:

10 [A] qualified written request shall be a written correspondence, other than notice
11 on a payment coupon or other payment medium supplied by the servicer, that-
12 (i) includes, or otherwise enables the servicer to identify, the name and
13 account of the borrower; and
14 (ii) includes a statement of the reasons for the belief of the borrower, to the
15 extent applicable, that the account is in error or provides sufficient detail to
16 the servicer regarding other information sought by the borrower.

17 12 U.S.C. § 2605(e)(1)(B).

18 Plaintiff has not provided a copy of the letter he states he sent to Litton and the complaint
19 fails to provide factual allegations demonstrating that the QWR included information that would
20 enable Litton to identify the borrowers' names and account, as well as a statement of the reasons
21 the borrowers believed the account was in error.

22 Under section 2605(f)(1), plaintiff must, at a minimum, allege the "actual damages" he
23 suffered as a result of Litton's failure to respond to his QWR. *See Sanchez v. Bear Stearns*
24 *Residential Mortgage Corp.*, 2010 U.S. Dist. LEXIS 46043 *11-12 (S.D. Cal.) (citing *Garcia v.*
25 *Wachovia Mortgage Corp.*, 676 F. Supp.2d 895, 909 (C.D. Cal. 2009)); *Garibay v. American*
26 *Home Mortgage Corp.*, 2010 U.S. Dist. LEXIS 29071 *6-9 (S.D. Cal.). In the present complaint
27 there are no allegations that plaintiff suffered "actual damages ... as a result of [Litton's] failure"
28 to respond to his QWR. 12 U.S.C. § 2605(f)(1)(A). Nor are there factual allegations suggesting
a "a pattern or practice of noncompliance" with RESPA. 12 U.S.C. § 2605(f)(1)(B). Without
factual allegations of actual damages or a pattern or practice of noncompliance, plaintiff cannot
state a claim under RESPA. *See Garcia v. Wachovia Mortgage Corp.*, 676 F. Supp.2d 895,

1 909-10 (C.D. Cal. 2009). But even if plaintiff stated a claim under RESPA, he seeks an
 2 accounting and actual and statutory damages based on RESPA. But there is no statutory basis
 3 for an accounting under RESPA. *See Orozco v. DHI Mortgage, Co. Ltd, LP*, 2010 WL 2757283,
 4 *6 (S.D. Cal. 2010) (citing *Gaitan v. Mortgage Elec. Registration Sys.*, 2009 WL 3244729, *13
 5 (C.D. Cal.2009)).

6 Even if the Court construes plaintiff's complaint as seeking an accounting independent of
 7 RESPA, the claim fails. "An accounting cause of action is equitable in nature, and may be
 8 sought 'where . . . the accounts are so complicated that an ordinary legal action demanding a
 9 fixed sum is impracticable.'" *Civic W. Corp. v. Zilla Indus. Inc.*, 135 Cal. Rptr. 915, 923 (Cal.
 10 Ct. App. 1977). The party seeking an accounting must be a "wronged fiduciary." *See*
 11 *Glue-Fold, Inc. v. Slautterback Corp.*, 98 Cal. Rptr.2d 611, 663 n. 3 (Cal. Ct. App. 2000). "A
 12 suit for an accounting will not lie where it appears from the complaint that none is necessary or
 13 that there is an adequate remedy at law. An accounting will not be accorded with respect to a
 14 sum that a plaintiff seeks to recover and alleges in his complaint to be a sum certain." *Id.*
 15 (citation omitted).

16 The facts alleged in the complaint do not demonstrate any sort of fiduciary relationship
 17 between plaintiff and Litton. *See Nymark*, 231 Cal. App. 3d at 1096. Moreover, there are no
 18 allegations that these accounts are particularly complicated or that there is no adequate remedy at
 19 law. *Civic W.*, 135 Cal. Rptr. at 923. As such, plaintiff has failed to state a claim for an
 20 accounting.

21 **B. Motion to Expunge Lis Pendens**

22 Plaintiff recorded a lis pendens on the property at issue under California Civil Code §§
 23 405.31 and 405.32. A lis pendens effectively prevents a sale or encumbrance of the property
 24 until litigation is resolved or the lis pendens is expunged. *See Kirkeby v. Superior Court*, 33 Cal.
 25 4th 642. 651 (2004).

26 A court "shall order the notice [of pendency] expunged if . . . the pleading on which the
 27 notice is based does not contain a real property claim." CAL. CIV. CODE § 405.31. A "real
 28 property claim" is defined, *inter alia*, as a cause of action "which would, if meritorious, affect . .

1 . title to, or the right to possession of, specific real property. . . ." CAL. CIV. CODE § 405.4. A
 2 plaintiff bears the burden of establishing, by a preponderance of the evidence, the probable
 3 validity of the claims.

4 The complaint has been dismissed as to defendant FCM Corporation for failure to serve
 5 the complaint. The two claims asserted against defendant Litton have been dismissed and the
 6 sole real property claim for quiet title has been dismissed with prejudice. Quality Loan Service
 7 Corporation, as the trustee under the Deed of Trust, has no interest in the real property. As a
 8 result of the dismissals, plaintiff has alleged no "real property claim" and the lis pendens is
 9 properly expunged.

10 **C. Motion to Withdraw as Attorney**

11 On October 18, 2010, Kent Wilson, Esq., counsel for plaintiff, filed a pleading styled as a
 12 "Notice of Withdraw of Counsel," which he docketed as a motion to withdraw.²

13 An attorney representing a client before a tribunal may not withdraw except by leave of
 14 court. *Darby v. City of Torrance*, 810 F. Supp. 275, 276 (C.D. Cal. 1992); CAL. R. PROF.
 15 CONDUCT 3-700(A)(1). Accordingly, a notice alone is insufficient to accomplish withdrawal.
 16 Because Mr. Wilson's filing is styled as a "notice," this is insufficient, and the notice is rejected.

17 Without an explanation, Mr. Wilson represents that he is withdrawing based on California
 18 Rule of Professional Conduct 3-700(B)(3). Rule 3-700(B)(3) applies when an attorney's
 19 "mental or physical condition renders it unreasonably difficult to carry out the employment
 20 effectively." This is at odds with Mr. Wilson's representations to the Court. At the hearing held
 21 on September 22, 2010, he represented that he had already resigned from the Bar and was no
 22 longer an attorney. The Court is therefore not inclined to grant leave to withdraw under Rule 3-
 23 700(B)(3).

24 Finally, this court requires counsel to "comply with the standards of professional conduct
 25 required of members of the State Bar of California, and decisions of any court applicable
 26

27 ² In general, attorneys must electronically file their pleadings in this District. *See*
 28 Civ. Local Rule 5.4. In the process they create docket entries in the court's file and are able to
 designate their filings as, for example, a motion or a notice.

thereto.” Civ. Loc. R. 83.4(b). Pursuant to California Rule of Professional Conduct 3-700(A)(2), an attorney may not withdraw until he “has taken reasonable steps to avoid reasonably foreseeable prejudice to the right of the client.” Mr. Wilson has not indicated if, or how, he has protected his clients from reasonably foreseeable prejudice occasioned by his withdrawal. Mr. Wilson’s motion to withdraw is therefore denied on this alternative ground.

For the foregoing reasons, Mr. Wilson’s notice of withdrawal will be rejected and, to the extent the notice can be construed as a motion for leave to withdraw, it will be denied.

D. Conclusion

Based on the foregoing, **IT IS ORDERED:**

a. Defendant’s motion to dismiss causes of action 4 and 5 asserted against defendant Litton is **GRANTED**;


b. Defendant’s motion to expunge lis pendens is **GRANTED**. The Lis Pendens recorded on February 4, 2010, as Instrument No. 2010-0056909 in the official records of San Diego County shall be expunged from the official records, and a copy of this Order may be recorded in the official records;

c. Directing the Clerk of the Court to close this case; and

d. Counsel Kent Wilson’s motion to withdraw as counsel of record is **DENIED**.

IT IS SO ORDERED.

DATED: November 18, 2010



M. James Lorenz
United States District Court Judge

COPY TO:

HON. CATHY ANN BENCIVENGO
UNITED STATES MAGISTRATE JUDGE

ALL PARTIES/COUNSEL